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14. Criminal Law (§ 1156 (4)*)—New Trial—Discretion of Court.—On motion for new trial on the ground that the jury impaneled had shown extreme prejudice against accused, the trial court has a discretion not reviewable in the absence of showing of injustice in view of Code 1904, § 3156, providing that no irregularity in drawing, summoning, returning, or impaneling jurors shall be sufficient to overturn the verdict unless the complaining party was injured.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 442, 463.]

Error to Hustings Court of Petersburg.

R. R. Allen was convicted of grand larceny, and he brings error. Affirmed.

L. O. Wendenburg, of Richmond, for plaintiff in error.

The Attorney General, for the Commonwealth.

G. OBER & SONS CO., Inc., v. WM. G. SMITH, Inc.

Jan. 24, 1918.

[94 S. E. 787.]

1. Appeal and Error (§ 266 (1)*)—Exceptions in Trial Court—Commissioner's Report.—Where no error is apparent on the face of the commissioner's reports, his conclusions and the decree of the court based thereon are conclusive upon appellant, who took no exceptions to reports in court below.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 565.]

2. Principal and Agent (§ 81 (2)*)—Commissions—Breach.—Where a principal was entitled to possession and control of notes received by his agent for fertilizer, because the agent had breached his contract, the withdrawal of the notes and undertaking to collect the same to the exclusion of the agent was not a breach.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 266.]

3. Principal and Agent (§ 83*)—Commissions—Breach.—Under contract entitling agent to bonus on sale of and settlement for 1,000 tons of fertilizer, he was not entitled to the bonus, although he had sold more than 1,000, where less than 1,000 had been collected for, and he breached his contract by failing to collect notes taken for remainder.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 266.]

Appeal from Circuit Court, Northampton County.

Action by G. Ober & Sons Company, Incorporated, against

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Wm. G. Smith, Incorporated. From the decree rendered, plaintiff appeals, defendant assigning cross-errors. Affirmed.

John T. Daniel, of Cape Charles, and *James E. Heath*, of Norfolk, for appellant.

Otho F. Mears, of Eastville, for appellee.

NORFOLK SOUTHERN R. CO. v. SMITH.

Jan. 24, 1918.

[94 S. E. 789.]

1. **Railroads (§ 344 (1)*)—Demurrer—When Proper.**—In view of Code 1904, § 3272, providing that on a demurrer the court shall not regard any defect, unless something essential has been omitted, so that judgment cannot be rendered, declaration in action for injuries at railroad crossing, which gave the date and place of the accident and such particulars as plainly informed defendant of every fact relied on by plaintiff which was essential to enable it to defend, and which charged negligence in several particulars and negligence under the last clear chance doctrine, was sufficient and not demurrable.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 595.]

2. **Railroads (§ 351 (3)*)—Crossing Accidents—Burden of Proof—Contributory Negligence—Instructions.**—In action for injuries to traveler at railroad grade crossing, instruction that burden of proving contributory negligence is upon defendant should have concluded, "unless such contributory negligence was disclosed by plaintiff's evidence, or could fairly be inferred from the circumstances."

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 407, 412.]

3. **Railroads (§ 351 (3)*)—Crossing Accidents—Burden of Proof—Instructions.**—In action for injury to traveler at grade crossing, when he drove on the track 50 feet ahead of an approaching train, it was error to refuse instruction that the law recognizes that nerves and muscles are not so co-ordinated that there can be instantaneous response, and that if the automobile was suddenly stopped on the track the jury should not find for plaintiff, unless he proved that in contemplation of the entire situation after the danger became known to the motorman, or ought to have been discovered by him by the exercise of ordinary care, he negligently failed to do something which he had a last clear chance to do to avoid the accident.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 412.]

4. **Railroads (§ 348 (1)*)—Injuries to Persons—Crossing Accident—Evidence—Sufficiency.**—In action for injuries to traveler at crossing, evidence held such that motion to set aside verdict for plaintiff as contrary to the law and the evidence should have been sustained.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 597.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.